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IN THE

Supreme Court of the United States

October Term, 1967
No. 941,
(and 559)

FRANK ANTHONY CARCERANO,

Petitioner,

vs.

CLARENCE T. GLADDEN, WARDEN OF THE OREGON STATE PENITENTIARY, JOHN DOE, acting Warden,

Respondent.

PETITION FOR A REHEARING.

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To the Honorable, the Supreme Court; Greetings:

I.

Preface.

The petitioner with great respect offers three ideas as to why a rehearing should be granted and the Order of the Oregon court denying the great writ of habeas corpus[1] should be vacated:

FIRST: This honorable court denied the petitioner Due Process and the Right to Counsel;

SECOND: The petitioner's argument that the Oregon ten-out-of-twelve constitutional amendment violates due process was ignored; and

[1]Not a "post-conviction statute" as stated by this court. (Pg. 1 of Petition for a Writ of Certiorari and Appendix "A" thereof.)

THIRD: The prospective-or-retroactive fiction is legislation and should not properly be applied to petitioner—if anyone.

II.

Three Ideas.

FIRST: THIS HONORABLE COURT DENIED THE PETITIONER DUE PROCESS AND THE RIGHT TO COUNSEL:

A. *Due Process:* A simple assertion, obvious, possibly well taken: an American in prison for life, allowed into the forum might well under a concept of "ordered liberty" be allowed to brief, meet and argue the points deemed by this court to be decisive; and

B. *The Right to Counsel* should be afforded if in the constitutional scheme of things the Petition for a Writ of Certiorari is part of the ball game. This of course is a concept that makes *Griffin v. Illinois* (1956), 351 U.S. 12 (76 S. Ct. 585), interesting to mention here.

True, the petitioner is technically without an attorney of record, but one had said an appearance would be made.[2]

SECOND: THE PETITIONER'S ARGUMENT, THAT THE OREGON TEN-OUT-OF-TWELVE CONSTITUTIONAL AMENDMENT VIOLATES DUE PROCESS WAS IGNORED:

It does.[3]

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[2]Page 26, Pet. for a Writ of Certiorari.

[3]And *contra,* Dicta from all sides in *Duncan v. Louisiana* (1968) ..... U.S. ..... (88 S. Ct. 1444), *"A criminal process which was fair and equitable but used no juries is easy to imagine"* from footnote of majority (Italics added); "I see no reason whatever, for example, to assume that our decision today should require us to impose federal requirements such as unani-

"'There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled. The denial of a fair and impartial trial, as guaranteed by the 6th Amendment to the Constitution, is also a denial of due proces, demanded by the 5th and 14th Amendments, and the failure to strictly observe these constitutional safeguards renders a trial and conviction or a criminal offense illegal and void and redress therefor is within the ambit of habeas corpus. (citations)."

Baker v. Hudspeth (1942), 129 F. 2d 779, 781. (Pet. for a Writ of Certiorari, pg. 14.)

Doesn't *Stovall v. Denno* (1967) ..... U.S. ..... (87 S. Ct. 1967 go on and do just what this petitioner suggests.[4]

Using the test of reasonable doubt—and to a moral certainty—isn't it obliterated when you think of the prosecution winning with two admitted holdouts, killing all of the great stories of the famous defense lawyers with their magic and the 11 to 1. This is America.

THIRD: THE PROSPECTIVE-OR-RETROACTIVE FICTION IS LEGISLATION AND SHOULD NOT PROPERLY BE APPLIED TO PETITIONER—IF ANYONE:

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mous verdicts or a jury of 12 upon the States." Mr. Justice Fortas, concurring; and then the dissent, a "'jury of exactly twelve' (Citation) is not fundamental to anything; there is no significance except to mystics in the number 12."

[4]Examine the due proces clause.

It must surely be better to let one innocent man stay in prison than to let nine guilty go free.

This court, part of this court, has done tragic things to implement the *TRUTH* of the last paragraph;

Using the *Stovall* test in petitioner's case,[5] (2) *the purpose to be served by the new standards,* (b) *the extent of the reliance by law enforcement authorities on the old standards, and* (c) *the effect on the administration of justice of a retroactive application of the new standards.*

Louisiana and Oregon are the only *two* states to even try to get away with this less-than-unanimous-trick on a felony, and neither had the heart to throw it at a man charged with a capital offense ("We gave him every chance.") But for this court to dignify their short-cut justice by a calling the right to a unanimous verdict, a "new" standard is to forget what forty-eight other states have not forgotten.[6]

This court says *that* these two short-cutters undoubtedly *relied* upon their own version of the law because of dicta in *Maxwell v. Dow.* Yet in *Duncan* the court indicates what history knows, that this is "a position long since repudiated" (and the dicta was respectively rejected).

In what case is a "new" standard so unique that it won't effect the administration of justice? And in even attempting to answer or apply the *Stovall* rules the

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[5]A life prisoner, unfortunately, in the same hamper with a man facing a few more days in jail, *Destafano v. Woods, supra.*

[6]Idaho (Const. Art. I, sec. 7) Montana (Art. III, Sec. 23) and Oklahoma (Art. II, sec. 19) allow less than unanimous for misdemeanors (Pet. for a Writ of Cert. at p. 13, fn. 13).

problem is easily discerned: the rules are vague, spacious and bent in any direction with the stroke of the pen.

Carcerano is doing life in Oregon. He appeals. He must have been deprived of his right to EFFECTIVE counsel because the 10-12 jury is not mentioned. Let's say that after Certiorari is denied the first time, he thinks of it; this Constitutional Amendment of 1934 hasn't been challenged since 1936 and that was just in Oregon on *Maxwell v. Dow;* the petitioner files habeas corpus (given renewed strength by this court[7] and more cases fall into Mr. Justice Black's camp with the 14th busy picking up the first 8, even the 6th right to a jury trial; and Carcerano's Writ is lodged before *Duncan* is even set for hearing. Then the decision in this case: the 14th picks up the 6th but this is the wrong remedy. This is hard to comprehend — without legislation, this is impossible to understand when a tally is made of the cases on the one side (prospective) and the cases on the other (retroactive).

Petitioner submits that he should be considered different than those whose appeals have become final pre-*Duncan,* because his point—certainly *not the* point in *Duncan*—was in the Clerk's Office of the court before the oral argument of *Duncan.*

Duncan isn't the first 6/14th right to trial by jury case. (*Cf., Parker v. Gladden* (1966) 87 S. Ct. 468, etc.)

Why isn't the problem more simple than the history, given in *Linkletter v. Walker,* (1965) 381 U.S. 626 (85 S. Ct. 1731)? Isn't the logical question a factor,

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[7] *Fay v. Noia* (1963) (83 S. Ct. 822) 372 U.S. 414.

i.e., how many men are released because of a decision that their constitutional rights have been violated, begs the question.

When a state fails to afford a defendant a jury trial with a unanimous verdict on a felony like all of its neighbors west of the Mississippi, that state knows it's trying to get away with murder.

Make this state give a fair trial to all men convicted without this fundamental right.

The right to transcript on appeal; the right to have an attorney present at a lineup; the right to have the judge hear about the confession outside the presence of the jury; none of these rights seem fundamental.

But, by George, if a prisoner has any piece of paper (form or substance?) over the counter of the court clerk BEFORE the world gets wind of it, then why in the name of Justice and Mercy can't his voice be heard and his prayer granted?

III.
Conclusion.

The *Linkletter-Stovall-DeStefano* rules have to be changed. The rules suspend the Writ of Habeas Corpus, "[t]he great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom." *Ex parte Yerger* (1868) 75 U.S. (8 Wall.) 85, 95.

If this man Carcerano is innocent, it's better that nine guilty inmates at Salem, Oregon are given a new

trial, than that Carcerano perish knowing that this court has said that his petition is only good for the new inmate in the next cell.

Respectfully submitted,

WALTER L. KRONEBERGER,
Attorney for Petitioner.

August 26, 1968, Torrance, California.

WHEREFORE, petitioner prays for his life and respectfully begs this Court to rehear his case so that he will not be forever denied a constitutional right.

FRANK ANTHONY CARCERANO
Petitioner